83-280

No. ..-....
IN THE

Supreme Court of the United States

October Term, 1983

UTILITY TRAILER SALES COMPANY,
Appellant,

vs.

MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA and JERRY BOWERS,
Appellees.

On Appeal From the Court of Appeal of the State of California.

JURISDICTIONAL STATEMENT.

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Question Presented.

Whether an agreement by an employer and a union during collective bargaining negotiations that the employer would not be liable for the theft of employee-owned tools preempts state law that purports to impose such liability.

Parties Below and Affiliates of Appellant.

The names of all parties in the proceedings below are contained in the caption of the case in this Court. In response to Supreme Court Rule 28.1, appellant Utility Trailer Sales Company ("Utility") states that it is licensed to do business in Alameda County, California under the name Bay Area Transport Refrigeration and that Utility Trailer Manufacturing Company is a major shareholder.

A copy of this Jurisdictional Statement is being served on the office of the California Attorney General, because 28 U.S.C. § 2403(b) may be applicable.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Court of Appeal of the State of California, First Appellate District (Appendix A), is reported at 141 Cal. App. 3d 80, 190 Cal. Rptr. 98. The Order of the United States District Court remanding the case to state court (Appendix B) is not reported. The Memorandum of Decision, Findings of Fact and Conclusions of Law, and Judgment of the Superior Court (Appendix C) are not reported.

JURISDICTION.

This appeal is taken from the decision of the California Court of Appeal filed on March 21, 1983. On May 19, 1983, a timely petition for hearing was denied by the California Supreme Court and the judgment of the Court of Appeal became final (Appendix D). Appellant filed a Notice

of Appeal to this Court in the California Court of Appeal on July 27, 1983 (Appendix E).

This appeal is being docketed in this Court within 90 days from the denial of hearing by the California Supreme Court. The jurisdiction of this Court to review the case on appeal is conferred by 28 U.S.C. § 1257(2) (appeal lies when a state statute is upheld over a claim that it is repugnant to the Constitution and laws of the United States).

CONSTITUTIONAL PROVISIONS AND STATUTES.

This case involves Article VI, Second Clause of the United States Constitution, Sections 1 and 8 of the National Labor Relations Act (29 U.S.C. §§ 151 and 158) and Section 2802 of the California Labor Code (see Appendix G).

STATEMENT OF THE CASE.

Appellant Utility employed appellee Jerry Bowers as a refrigeration mechanic in accordance with the terms of a collective bargaining agreement made effective October 1, 1977 and reached with appellee Machinists Automotive Trades District Lodge No. 190 of Northern California ("the Union"). As is customary in the industry, Bowers provided certain of his own tools to perform his job duties. In selecting his own tools, Bowers brought to work a set of tools that was quite expensive, four times the cost of other good tools according to his own testimony in this matter. Bowers left his tools on Utility's premises overnight. During the Thanksgiving weekend of 1977, thieves broke into Utility's premises and stole Bowers's tools, among other things.

When Utility declined to reimburse Bowers for the tools which had been stolen, Bowers filed a grievance under the collective bargaining agreement. The matter was submitted to arbitration. On February 13, 1979, the arbitrator issued his award (Appendix F). The arbitrator found that, during negotiations for the labor contract, the Union had proposed

that Utility reimburse its employees for employee-owned tools which were lost or stolen. The arbitrator noted that tool reimbursement also had been the subject of collective bargaining involving other employers in the same geographic area. However, the arbitrator found that Utility had declined to agree to the tool reimbursement proposal and that the collective bargaining agreement entered into did not provide for reimbursement for tool losses. Accordingly, the arbitrator denied Bowers's claim (Appendix F also includes a letter to the arbitrator from appellees' counsel asking the arbitrator to reconsider his award, and the arbitrator's letter in reply, which were made part of the record below).

The Union and Bowers then filed an action in the Superior Court of Alameda County, California, on February 27, 1979, seeking reimbursement for the loss of tools under California Labor Code Section 2802 and on the grounds that an alleged oral part of the labor agreement between Utility and the Union provided for tool reimbursement. Utility removed the case to the United States District Court for the Northern District of California pursuant to Section 301 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 185. On October 12, 1979, the District Court granted summary judgment to Utility on the oral contract claim, enforcing the decision of the arbitrator, and remanded the Section 2802 claim to Superior Court, noting in its opinion that if Section 2802 were interpreted to cover the situation, "a difficult preemption question is raised" (Appendix B).

Utility argued the NLRA preemption issue in its papers at each stage in the court proceedings. Since the Superior Court held that Section 2802 did not provide reimbursement for tool loss, however, following the long-standing interpretation of Section 2802 found in *Earll v. McCoy*, 116 Cal. App. 2d 44, 253 P.2d 86 (4th Dist. 1953), it expressly did not reach the preemption issue (Appendix C).

The Union and Bowers appealed to the California Court of Appeal for the First Appellate District. That court reversed the Superior Court, disagreeing with the Fourth Appellate District's decision in *Earll v. McCoy*, and interpreting Section 2802 to provide for tool reimbursement. The Court of Appeal's opinion tersely dealt with Utility's preemption arguments, stating that "the fact that a matter is a subject of collective bargaining does not preclude the state from adopting standards to protect the welfare of workers" (Appendix A).

Utility filed a petition for hearing before the California Supreme Court, addressing both the state law and federal preemption issues, but that court denied hearing without opinion (Appendix D).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

This Court has long recognized that, in order to effectuate the federal policy in favor of collective bargaining, an agreement reached by an employer and a union on a mandatory subject of bargaining preempts any state law that purports to conflict with that resolution. The decision below has significance that far transcends its specific application because it totally ignores this principle. Instead, it holds that a state is free to regulate and interfere with the collective bargaining process any time the state feels it is necessary to "protect the welfare of workers." Because such a holding threatens to undermine the central purpose of the federal labor laws, this appeal, which falls within the Court's mandatory jurisdiction, warrants plenary review.

A. The Decision Below Threatens and Contravenes the Decisions of This Court Holding That Agreements Reached During Collective Bargaining Generally Supersede Any Conflicting State Law.

In *Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283, 79 S.Ct. 297 (1959),

this Court held that a collective bargaining agreement setting the terms under which owner-operators of trucks would lease their vehicles to transport companies preempted the application of a state's antitrust law to forbid such an arrangement. The terms of the leasing of the vehicles were established in the collective bargaining agreement to ensure that the drivers' wages as set in the collective bargaining agreement would not be undercut by inadequate rental fees for the vehicles. Accordingly, the Court found that the setting of the rentals was a mandatory subject of collective bargaining. 358 U.S. at 295, 79 S.Ct. at 304. The Court stated that:

> Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. *To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here.* Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, ... *We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions.* Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

358 U.S. at 295-296, 79 S.Ct. at 304-305 (emphasis added, citations omitted).

This conclusion was a necessary outgrowth of the Court's decision in *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912 (1957), in which the Court held that suits under Section 301 of the NLRA [29 U.S.C. § 185] must be decided on the basis of uniform federal substantive law that is paramount to any incompatible state law. A uniform body of federal law could not be developed if collective bargaining agreements were subject to being superseded by variant state or local laws. Accordingly, the paramount federal law recognizes the unique nature of collective bargaining agreements, that such agreements are more than ordinary contracts. "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Oliver*, 358 U.S. at 295, 79 S.Ct. at 304. "A collective bargaining agreement is an effort to erect a system of industrial self-government." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580, 80 S.Ct. 1347, 1351 (1960).

The holding of *Oliver* has been repeatedly reaffirmed by this Court. For example, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525-526, 101 S.Ct. 1895, 1907-1908 (1981), this Court held that where pension plans emerge from collective bargaining, they become expressions of federal law, preempting state law. In the instant case, however, the California Court of Appeal ignored the important position given to collective bargaining agreements under federal law. That court brushed aside Utility's preemption arguments without analyzing them (Appendix A). The state

court's decision violates federal policy and, if left standing, would open the door to further interference with federal labor law.

B. The Decision Below Improperly Expands the Scope of the Limited Exception to Preemption Under Oliver.

In *Oliver*, this Court implied that there is an exception to the preemption rule, stating that, "We have not here a case of a collective bargaining agreement in conflict with *a local health or safety regulation*; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." 358 U.S. at 297, 79 S.Ct. at 305 (emphasis added). Without directly referring to *Oliver*, the opinion of the California Court of Appeal apparently attempted to fit this case within the exception by referring to a state's power to protect workers' welfare.

The *Oliver* exception, however, is not that broad. This Court did not focus on health or safety regulation in a vacuum. The general concept had been discussed in *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420 (1943). That case was cited in *Oliver* to support the proposition that in establishing collective bargaining on mandatory subjects Congress was not concerned with the substantive terms agreed upon by the parties. *Oliver*, 358 U.S. at 295, 79 S.Ct. at 304. In *Terminal Railroad Association*, this Court upheld a state requirement that a railroad provide cabooses for its employees in addition to the cabooses specified in a collective bargaining agreement, over a claim that the Railway Labor Act [45 U.S.C. §§ 151 *et seq.*] preempted the state requirement. This Court's analysis in that case demonstrates the close connection that a state regulation must have to health or

safety in order to avoid preemption by a collective bargaining agreement. The Court stated that it could not be expected to hold that "the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation." 318 U.S. at 7, 63 S.Ct. at 423. A state is allowed to establish minimum requirements in those areas. *Id.* In view of local climatic conditions and particular structural hazards along the railroad tracks, the Court found that the caboose regulation had a "rather obvious relation to the health and safety of local workmen." 318 U.S. at 8, 63 S.Ct. at 424.

Although this Court has repeatedly upheld *Oliver*, it has not analyzed the scope of its exception to preemption for local health or safety regulations, and cases decided since *Oliver* demonstrate that there is an urgent need to do so. Some courts have looked for guidance. *See, Attorney General v. The Travelers Insurance Co.*, 385 Mass. 598, 433 N.E.2d 1223, 1231 n.23 (1982), *vacated and remanded*, ... U.S. ...., 51 U.S.L.W. 3937 (1983) (Supreme Judicial Court of Massachusetts notes that this Court recognized the health or safety exception in *Oliver* but has not actually applied it); *Porter v. Quillin*, 123 Cal. App. 3d 869, 876, 177 Cal. Rptr. 45, 49 (1st Dist. 1981) (California Court of Appeal notes that "there is a remarkable dearth of authority as to the scope" of the exception).

Other courts, however, have used this lack of guidance to evade *Oliver* completely. The "exception swallowed the rule" in *Michigan Transportation Co. v. Secretary of State*, 41 Mich. App. 654, 201 N.W.2d 83 (1972). The Michigan Court of Appeals expansively held that an exercise of a state's police power was the same thing as a health or safety regulation. 201 N.W.2d at 96.

Similarly, the California Supreme Court has ruled that collective bargaining does not preempt the state's "broad authority to establish minimum standards related generally to the 'welfare' of employees." *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 728, 166 Cal. Rptr. 331, 353, 613 P.2d 579, 601, *app. dism'd and cert. den.*, 449 U.S. 1029, 101 S.Ct. 602 (1980). Although "minimm standards" sounds reminiscent of the reasoning of this Court's decisions in *Terminal Railroad Association* and *Oliver*, in fact the California Supreme Court specifically disapproved a prior decision of the California Court of Appeal (*United Air Lines, Inc. v. Industrial Welfare Commission*, 211 Cal. App. 2d 729, 744, 28 Cal. Rptr. 238, 245 (1st Dist. 1963)) which had relied on *Oliver* to hold that state regulation must be limited to health or safety when it impacts the working conditions of employees subject to the Railway Labor Act. 27 Cal. 3d at 728 n.15, 166 Cal. Rptr. at 353 n.15, 613 P.2d at 601 n.15.

This error has been repeated in this case. In its opinion below, the California Court of Appeal relied on *Industrial Welfare Commission* in rejecting Utility's preemption arguments. The threat a broader exception poses to *Oliver* and the policy on which it is based is readily apparent from the specific holding in this case. As interpreted by the California Court of Appeal, Section 2802 would extend a purely economic benefit, reimbursement for stolen tools, to all employees, regardless of the wage rate or other benefits they enjoyed. If the state may regulate that kind of benefit, it could require that all employees receive other economic benefits, such as a specified amount of vacation, sick leave, or life insurance. Yet, such benefits would have nothing more to do with "health or safety" than state-imposed pension terms, which this Court has already held are preempted under *Oliver* by a collective bargaining agreement. *Alessi*

v. Raybestos-Manhattan, Inc., supra, 451 U.S. at 525-526, 101 S.Ct. at 1907-1908.

Utility respectfully submits that, unless this Court takes this opportunity to examine and clarify the very limited nature of the health and safety exception to *Oliver*, the strong federal policy in favor of collective bargaining will be undermined. Employers and unions will have no incentive to bargain in good faith to establish the system of "industrial self-government" contemplated by this Court because state courts and legislatures will be free to modify even the most fundamental economic terms of their deals.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal.

DATED: August 16, 1983.

Respectfully submitted,

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APPENDIX A.

Opinion.

In the Court of Appeal of the State of California, First Appellate District, Division Three.

Machinists Automotive Trades District Lodge No. 190 of Northern California and Jerry Bowers, Plaintiffs and Appellants, v. Utility Trailer Sales Company, Defendant and Respondent. AO13201, 1 Civ. 53204 (Sup.Ct.No. 518020-8).

Filed: March 21, 1983.

On this appeal by an employee (Bowers) and his union Machinists Automotive Trades District Lodge No. 190 of Northern California (Union) from an adverse judgment, the only question is whether Labor Code section 2802[1] provides a statutory right to indemnity from the employer, Utility Trailer Sales Company (Employer), for the loss of Bowers' tools in a weekend burglary of the Employer's premises. For the reasons set forth below we have concluded that Bowers was entitled to indemnity and we reverse.

The facts were not in dispute and were found as follows by the court: Bowers, a refrigeration mechanic, pursuant to the custom of the industry, furnished the tools necessary to do his assigned work. Bower's tools were very heavy and were kept in two toolboxes. Three men were needed to move one toolbox; the other could be moved only by forklift.

Bower's tools were kept inside the inner building of the Employer's shop. Before the Thanksgiving weekend of 1977, Bowers locked his tools in the inner office provided by the employer by welding a steel bar across the inner door. The tools were stolen in a burglary over that weekend. Bowers'

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[1]All statutory references hereinafter are to the Labor Code, unless otherwise indicated.

tools were valued at over $8,000. The Employer refused to reimburse him. The parties submitted the question of whether Bowers had a right to reimbursement to arbitration under their collective bargaining agreement. After the arbitrator rendered a decision in favor of the Employer, Bowers commenced the instant summary judgment proceedings; the matter was submitted on the transcript of the arbitration proceedings and the additional briefs and argument of the parties.

Section 2802, in pertinent part, provides: "An *employer shall indemnify his employee for all that the employee* necessarily expends or *loses in direct consequence of the discharge of his duties* as such . . . ." (Emphasis added). The question here is whether the loss occurred in *direct consequence* of the employment.

Preliminarily, we dispose of the Employer's contention that Bowers' statutory claim was preempted by federal labor law. The Employer argues that the terms of Bowers' employment were a subject of collective bargaining, and the final resolution of that issue in the bargaining supersedes any state law. The record, however, indicates that here the arbitrator concluded that the issue of indemnity for the loss of tools was not resolved by collective bargaining, as the parties failed to agree upon a proposal covering tool losses. The record also indicates that the Employer intended to deal with the indemnity issue at its own discretion on a case-by-case basis. Moreover, the fact that a matter is a subject of collective bargaining does not preclude the state from adopting standards to protect the welfare of workers. (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 728.) In any event, Bowers' statutory right to indemnity is independent of any contractual right. (*Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 52.) The arbitrator here had authority only to resolve contractual questions. (*Id.*, at pp. 53-54.)

While Bowers was required to provide the tools necessary for his work pursuant to the custom of the industry,[2] he was not required to leave the tools on the Employer's premises nights and weekends. Given their weight and the equipment and men required to move them, carrying the tools back and forth from the Employer's premises would have been practically impossible. In addition, the Employer required employees to submit to an inspection and inventory whenever tools were brought to and taken from its premises. The trial court found that the Employer's inspection and inventory procedures were for the purpose of safeguarding the tools for the benefit of the employees and not to permit the Employer control of the use and availability of the tools.

The trial court and the Employer relied on *Earll v. McCoy* (1953) 116 Cal.App.2d 44,[3] in which a fire destroyed the hand tools voluntarily left by automobile mechanics on the premises of the employer. The tools, furnished by the employees, for practical reasons and by custom and usage, were left in the garage overnight. The tools weighed several hundred pounds; the employer gave no express instructions to his employees to leave the tools on the premises, but his foreman discouraged the employees from taking them home. In holding that section 2802 did not apply, the court, at 47, noted that the losses covered by the statute "must be *in direct consequence of the discharge of the employee's duties or in obedience to the employer's directions*." (Emphasis added.) The court also noted that the employer exercised

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[2]In the instant case, the trial court adopted the arbitrator's finding that Bowers supplied his own tools pursuant to the custom of the industry, and rejected Bowers' contention that he was required to furnish the tools as a condition of employment.

[3]We note that although the petition for hearing of that case was denied April 9, 1953, Chief Justice Gibson, Justice Carter and Justice Traynor were of the opinion that the petition should have been granted. (*Id.*, at p. 47.)

no control over the tools, but that it was impractical for the employees to remove the tools on a daily basis. We do not find the reasoning of the Fourth District in *Earll, supra*, persuasive or in accord with the purpose of the statutory scheme of which section 2802 is a part.

Nor do we find helpful the bailment analysis often utilized by other jurisdictions.[4] (See Employer's Liability for Theft or Disappearance of Employee's Property Left at Place of Employment, 46 A.L.R. 3d 1306.) For example, *Johnson & Towers Baltimore, Inc. v. Bobbington*, 264 Md. 724, 288 A.2d 131, is almost factually identical to the instant case: the employees were required to furnish their own tools and it was impractical for them to take home a full tool box because of its weight; the employees' tools, stored in the work area, were taken in a weekend burglary.[5] The employer conceded that it was a bailee for mutual benefit and therefore under a duty to use ordinary care. The jury was so instructed. The appellate court in affirming the judgment on the verdict for the employees pointed out that the employer's negligence was a question of fact and that there was legally competent evidence from which the jury could infer that the employer had failed to exercise ordinary care and this failure was the proximate cause of the injury. (Cf. *Lissie v. Southern New England Telephone Co.*, (Sup.Ct. Conn. 1975) 359 A.2d 187, 189 (bailment for mutual benefit created where employee left coat in designated area).)

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[4]Usually a bailment analysis results in relieving the employer of liability unless negligence can be established; the more recent bailment cases, however, imply an involuntary bailment for mutual benefit and hold the employer liable.

[5]There was also evidence that the locks on the premises of the employer were ineffective and that 3-4 prior attempts had been made to enter the locked premises where the tools had been kept, at least one of them successful.

Collins v. Boeing Co. 4 Wash.App. 705, 483 P.2d 1282, also involved the theft of the employee's tools from the premises of the employer. The tools belonged to the employee, were kept in his locked box and weighed about 80 pounds; some of the tools were required by the employer; additional ones were voluntarily supplied by the employee; the evidence did not disclose the weight of the employer-required tools and the employee-added ones. Boeing supervisors periodically required employees to undergo toolbox inspections on exit and ingress in order to check the presence of Boeing tools and as part of the 24-hour a day security arrangements. While we do not agree with the conclusion of no duty of care reached by the *Boeing* court, we have found its careful examination of public policy alternatives helpful in construing our statutes.

The *Boeing* court reasoned that there was no bailment for mutual benefit and hence no duty of care by the employer because the basic reason for the presence of the tools on the premises was the convenience of the employee, although there was an incidental benefit to the employer through the reduction of exit and ingress delays and a possible speedup in work because of the additional tools supplied by the employee.

The *Boeing* court also noted that no bailment was created as the employee had not surrendered possession to the employer and the employee was in a better position to exercise control than the employer. The court opined, however, that the employer's ingress and egress inspection requirements and security measures might suggest a change of control and assumption by the employer of a duty of ordinary care to prevent theft by a third person. In reaching a conclusion of no duty of care, the court relied upon factors not present here: (1) from the inception of the employment relationship, without objection from the employee and consistent with

industry practice, the employer had disclaimed liability for theft by third person; and (2) the employee knew at all times that the employer provided no receptacles or lockable enclosures, and the union had never objected to the employer's initial and continuing policy of non-liability. Thus, the court found that the voluntariness of the agreement of nonliability had not been challenged, and further pointed out that if an involuntary or constructive gratuitous bailment had arisen, the employer's duty would have been discharged by slight care.

In any event, unlike the court in *Boeing*, or those jurisdictions that have utilized a bailment analysis to reject the employer's liability (for a recent example, see *Farmer v. Machine Craft, Inc.* (Ala. 1981) 406 So.2d 981, and see other cases collected at 46 ALR 3d 1306, *supra*), we are faced with construing sections 2800,[6] 2802 and the recently added section 2800.1[7] The legislative history of the most recently added provision is shrouded in mystery. Arguably, by application of the doctrine of *ejusdem generis* (expression of one thing excludes another), the specific mention of an employer's duty to safeguard an employee's musical

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[6]Section 2801 pertains to personal injury actions.

[7]This section, added by Statutes 1973, chapter 497, section 1, page 972, provides:

"An *employer shall in all cases take reasonable and necessary precautions to safeguard musical instruments and equipment, belonging to an employed musician, located on premises under the employer's control. In the event such equipment is* damaged or *stolen* as a result of the employer's failure or refusal to take such reasonable and necessary precautions, *the employer shall be liable to the owner for repair or replacement* thereof if the employed musician has taken reasonable and necessary precautions to safeguard the musical instruments and equipment.

"For the purposes of this section: (a) 'employer' includes a purchaser of services and the owner of premises upon which an employed musician is working; and (b) 'employee' is any employed musician working on premises which are under an employer's control." (Emphasis added.)

instruments excludes such a duty as to any other tools of the trade owned or provided by an employee. However, a converse maxim of statutory construction states that the language of a statute may fairly comprehend many different cases where only some are expressly mentioned by way of example. (*Springer v. Philippine Islands* (1928) 277 U.S. 189.) The fact that section 2800.1 is in this latter category is readily apparent when it is read in the context of, and construed together with, sections 2800 and 2802. Sections 2800, 2800.1 and 2802 must be harmonized and construed together. (Code of Civil Procedure section 1859; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) Section 2800 provides: "An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care;" section 2802, as indicated above, provides for indemnity for losses in direct consequence of the discharge of the employee's duties.

Here admittedly Bowers' tools were so heavy that he had no option but to leave them in the inner room on the premises provided by the Employer. Further, by its inspection requirements and security provisions the Employer exercised a substantial amount of control over Bowers' tools. Our Supreme Court has indicated that "legal duties are not discoverable facts of nature, but merely conclusory expressions, that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of the Univ. of Cal.* (1976) 17 Cal.3d 425, at 434.)

We hold that section 2802 applies where, as here, the custom of the trade requires the employee to supply his own tools for the performance of his duties, and while the employer does not require the employee to leave his tools on the employer's premises, the tools are too heavy to be transported routinely to and from the place of employment. Bowers' tools were left locked on the premises in the inner room

provided by the Employer. The loss therefore was incurred in direct consequence of the discharge of the employee's duties, and was therefore incidental to his employment. (Cf. *Waugh v. University of Hawaii* (Sup.Ct. 1981) 621 P.2d 957, 970-971, University held to have duty of ordinary care toward professor's laboratory research materials left in its care during a sabbatical on the basis of the general rule that all persons are required to use ordinary care to prevent the property of others from being injured.)

We conclude that when section 2802 is construed with sections 2800 and 2800.1, it provides Bowers a statutory right to indemnity for the loss incurred in direct consequence of the employment.

The judgment is reversed.

Appellants shall have their costs on appeal.

CERTIFIED FOR PUBLICATION

Feinberg, *J.*

I concur:

White, *P.J.*

I dissent.

The record of arbitration proceedings shows that during the 1977 contract negotiations between the Union and Employer, the Union proposed that the Employer, in effect, be required to provide "Tool Insurance" (straight reimbursement for loss), and that the Employer refused to place a provision of this kind in the contract. The arbitrator found that Bowers was not entitled to reimbursement for his stolen tools under the contract. Bowers now asks this court to construe Labor Code section 2802 as imposing such a "Tool Insurance" on Employer. I cannot agree with the majority's interpretation of that section as doing so. Rather, as I read the statutory scheme here in question, Employer's liability, if any, for Bowers' loss of tools must be pursuant to Labor Code section 2800, not section 2802.

Labor Code section 2800 provides, "An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care." It is significant that when the Legislature enacted section 2800.1 (musician's instruments), it placed the new statute directly after section 2800, indicating that it is a specific example of the kind of negligence for which an employer must indemnify an employee under section 2800, not section 2802. The analogy between a musician whose instrument is left on the employer's premises and a mechanic whose tools are left at his place of employment is clear. In either case the worker is entitled to recover for loss occasioned by the employer's negligence.

Labor Code section 2802, on the other hand, imposes strict liability, but only for "all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, . . ." I believe the majority reaches an incorrect result by placing undue emphasis on the term "direct consequence" and failing to consider the

entire context in which that term appears. Thus, while it cannot be seriously argued that Bowers' loss would not have occurred but for his employment, neither can it be said that the weekend burglary of Employer's premises resulted in a loss which Bowers "*necessarily*" incurred "in *direct* consequence of the *discharge* of his duties *as such*, . . ." (Emphasis added.)

Cases arising under Labor Code section 2802 are few. Those decisions construing the statute indicate that it was intended to cover such necessary expenditures and losses as those incurred by reason of a salesman being sent to various counties to sell goods (see *Automobile etc. Co. v. Salladay* (1921) 55 Cal.App. 219) or those incurred by a reporter defending a suit by a third person for his conduct in the course and scope of his employment (*Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449).

If Bowers had suffered loss or damage to his tools while he was working, Labor Code section 2802 would apply. But where, as here, the loss was one which did not "necessarily" occur as a "direct consequence" of his work "as such," the Employer should be liable only for loss occasioned by lack of ordinary care under section 2800.

To this extent, I believe that *Earll v. McCoy* (1953) 116 Cal.App.2d 44 correctly held that loss to fire of tools left on the premises did not come within the purview of Labor Code section 2802.

I would therefore hold that Bowers could only recover for loss of his tools under Labor Code section 2800, and I would remand the cause for consideration of the question whether the loss was occasioned by Employer's want of ordinary care.

Barry-Deal, *J.*

APPENDIX B.

Order.

In the United States District Court for the Northern District of California.

Machinists Automotive Trades District Lodge No. 190 of Northern California and Jerry Bowers, Plaintiffs, v. Utility Trailer Sales Company of Northern California, Defendant. Utility Trailer Sales Company of Northern California, Counterclaimant, v. Machinists Automotive Trades District Lodge No. 190 of Northern California and Jerry Bowers, Counterclaim Defendants. No. C-79-0771-WA1.

Filed: October 18, 1979.

The Court has considered the arguments presented by counsel in their briefs and orally on October 5, 1979.

With respect to the oral contract claim, the Court concludes that defendant is entitled to summary judgment. The Court takes note of the Ninth Circuit's recent decision in *Certified Corporation v. Hawaii Teamsters and Allied Workers, Local 996, IBT*, 597 F.2d 1269 (1979), holding that a collective bargaining agreement may be modified orally despite a contract provision requiring that any changes be in writing. However, this issue was raised during the arbitration proceeding and disposed of by the arbitrator, who concluded that no agreement was reached between the employer and the union with respect to tool insurance or indemnification for lost tools. *See*, Arbitrator's Award, February 13, 1979, pages 4-5, 11-12. The arbitrator stated clearly, "Even if the union's position that 'Co. No' on tool insurance for 9-23 was only a short version of the 'no language in contract' proviso attached to the 9-19-77 entry is accepted, it leaves unanswered the question of why language should not have been placed in the agreement in the face of the intention of the zipper clause." (p. 11). The arbitrator

arbitrator reasonably concluded that tool insurance was not part of the agreement, not simply that it was not included in the written collective bargaining agreement. In addition, in *Certified Corporation* the Court was faced with an oral *modification* to the agreement. Here, plaintiff is urging us to hold that a concurrent oral agreement contrary to the express language of the written agreement is valid and binding. This the Court cannot do.

The parties may not relitigate an issue which has been fully and fairly decided in an arbitration proceeding. *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corporation* 363 U.S. 593 (1960). The arbitrator's decision that there was no oral contract regarding tool insurance or indemnification is affirmed. Defendant is granted summary judgment on the oral contract claim.

With the oral contract claim decided, this Court has only to decide the merits of the California Labor Code § 2802 claim. This is a state law claim, which can be decided by this Court only by exercise of pendent jurisdiction. This Court clearly has the power to decide this issue, and the fact that the federal claim has been disposed of does not deprive the Court of this power. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The Court, however, has concluded that it would be unwise to exercise its discretion in this instance. A difficult preemption question is raised if § 2802 is held to be applicable to this situation. Absent clear direction from the state courts, this Court is unprepared to interpret a state statute and then conclude that it is preempted. As another court faced with a similar situation has stated, "These substantive issues of state law would have to be determined if pendent

jurisdiction was exercised. The Court declines to forage into undecided areas of state law especially when as here, the parties agree that the real objective of the law suit is the resolution of the state claims." *City of Stuart, Florida v. Clifford Ragsdale, Inc.*, 407 F. Supp. 1368, 1369 (S.D. Fla. 1976). A state court determination that the statute is not applicable to this situation will avoid any preemption issue. But crucial to the inquiry is a ruling which fairly interprets § 2802. This is a legitimate claim brought by the union in good faith. It is an issue for a state court to decide.

The Court concludes that the union is entitled to summary judgment on the employer's counterclaim. This action is not frivolous. A valid and important issue regarding the meaning of § 2802 has been raised, and it remains to be decided by the state court where this case began. The Court cannot find that the union is proceeding in bad faith. Consequently, the Court holds that the defendant's counterclaim is without merit. Defendant has not been damaged as a result of this lawsuit, and is not entitled to receive its attorneys' fees for the defense of this action.

That portion of the plaintiff's claim which related to California Labor Code § 2802 is remanded to the Superior Court for the County of Alameda for decision.

Judgement will be entered for defendant on the oral contract claim. Judgement will be entered for plaintiff on the counterclaim by defendant. Each party will bear its own costs.

IT IS SO ORDERED.

Dated: October 12, 1979

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

APPENDIX C.

Memorandum of Decision.

In the Superior Court of the State of California in and for the County of Alameda, Before the Honorable Robert L. Bostick, Judge, Department No. 22.

Machinists Automotive Trades District Lodge No. 190 of Northern California & Jerry Bowers, Plaintiffs, vs. Utility Trailer Sales Company, Defendant. No. 518020-8.

Filed: November 10, 1980.

The above-entitled matter having duly come on for hearing, and the matter having been submitted, the court finds as follows:

This case is on remand from the federal district court for disposition of a pendent state claim involving an employee's right to reimbursement from his employer under Cal. Labor Code § 2802. The facts, stated below, were submitted by way of an arbitration transcript. In the arbitration proceeding, it was determined that Bowers (plaintiff herein) has no right to reimbursement under the collective bargaining agreement between Utility Trailer Sales Co. (defendant herein) and the Machinists Union (co-plaintiff herein). The issue before this court is whether plaintiff Bowers has a statutory right to reimbursement under Labor Code § 2802.

FACTS

Plaintiff is a mechanic employed by defendant. As is customary in the industry, plaintiff furnished his own work tools.[1] Plaintiff and the other mechanics stored their tools

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[1]Plaintiff contends that he furnished his own work tools as a "condition of employment." *See* Trial Brief of Plaintiff at 3. The arbitrator expressly found that the tools were furnished by plaintiff because of industry custom. *See* Arb. Award at 3. The court adopts the arbitrator's finding.

in defendant's office which was secured by a locked metal bar. During Thanksgiving weekend in 1977, thieves broke into the office and stole, among other things, plaintiff's tools valued over $8,000. Defendant declined to reimburse plaintiff and this proceeding followed.

DECISION

1. *Is the arbitration decision res judicata on the statutory cause of action under Labor Code § 2802?*

The arbitration decision is not res judicata on the cause of action asserted under Labor Code § 2802. The arbitration proceeding was limited to the issue of whether there was a right to reimbursement under the collective bargaining agreement. The question of statutory entitlement under § 2802, although raised in argument to support a favorable interpretation of the collective bargaining agreement, was not submitted to the arbitrator. Indeed, Labor Code § 2802 is not mentioned in the decision. Accordingly, the court finds that the arbitrator's decision is not res judicata and that the matter of reimbursement under Labor Code § 2802 is properly before the court.

2. *Does plaintiff have a statutory right to reimbursement under Labor Code § 2802.*

Labor Code § 2802 provides:

> An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the empioyer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

The applicability of § 2802 to a claim for reimbursement for employee tool loss was addressed in *Earll v. McCoy 116 Cal.App.2d 44*. In *Earll* auto mechanics sought reimbursement for the loss of their work tools occasioned by a

fire during the night. The mechanics, who received salary plus a percentage, furnished their own tools which, for practical reasons and by custom and usage, were left in the garage overnight. The employer did not expressly instruct the mechanics to leave their tools on the premises, but the mechanics were discouraged from taking them home. In any event, the mechanics were free to take the tools away at any time.

The court held that the loss of the work tools was not incurred in the direct consequence of the discharge of the mechanics' duties, but was a loss suffered incidental to their employment.

> The losses were directly caused by fire at a time when the tools were not being used in the discharge of the duties of the employees or in obedience to the employer's instructions, and where, as here, the court found that the plaintiffs [mechanics] were not required to leave their tools at the place of employment, section 2802 of the Labor Code is not applicable. *116 Cal.App.2d at 46.*

Plaintiff contends that *Earll* is not controlling and seeks to distinguish the case in the following respects: First, the tools in *Earll* were provided by the employees because of custom and practice, whereas here, plaintiff furnished his own tools as a condition of employment. The distinction is not supported by the facts the arbitrator having expressly found that plaintiff furnished his own tools because of industry custom.

Second, plaintiff states that defendant had control of the tools while the employer in *Earll* did not have such control. Plaintiff points to defendant's tool inventories and inspections as evidence of this control. This distinction is similarly not supported by the facts. Defendant's inventory and inspection practices appear to be directed at safeguarding the

tools for the employees' benefit, not at controlling their use or availability. Indeed, plaintiff had a key to the tool area.

Third, plaintiff urges this court to find that his tools were so numerous and heavy that it was "impossible" to remove them from the premises. In *Earll* the court found that the tools were such as to make it impractical to take them away. Plaintiff's requested finding cannot be supported by the facts which, at best, support a finding of impracticability.

Finally, plaintiff seeks to distinguish *Earll* on the basis of an element of negligence alleged to be present in the instant case, an element not present in *Earll*. To the extent negligence is here involved, there may be a separate and distinct basis of recovery in tort. But negligence, even if found, will not entitle plaintiff to reimbursement under Labor Code § 2802 where, as here, plaintiff does not otherwise meet the conditions of that statute. In any event, the arbitrator found no negligence by the defendant. *See* Arb. Award at 3. Further, plaintiff did not allege negligence in his complaint.

CONCLUSION

Plaintiff has failed to distinguish *Earll* from the instant case. Per *Earll*, plaintiff did not suffer a loss "in direct consequence of the discharge of [his] dutie[s] as employee." The theft occurred at night when plaintiff was not engaged in the discharge of his duties. The tools were not lost by way of obedience to the directions of the employer since plaintiff did not establish that defendant required him to leave his tools on the premises. In light of the above, plaintiff is not entitled to reimbursement under Labor Code § 2802.

Earll compels the conclusion that Labor Code § 2802 is not applicable to this case. Accordingly, the questions of waiver under Labor Code § 2804, and preemption of § 2802

by the NLRA need not be addressed.

Judgment for defendant. Defendant to prepare findings of fact and conclusions of law, if requested.

Dated: Nov. 7, 1980.

/s/ Robert L. Bostick
Judge of the Superior Court

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of Alameda.

Machinists Automotive Trades District Lodge No. 190 of Northern California & Jerry Bowers, Plaintiffs, v. Utility Trailer Sales Company, Defendant. Case No. 518020-8.

Filed: January 22, 1981.

This matter came before the Court for trial before the Honorable Robert L. Bostick, Judge, pursuant to a stipulated record. The Court having considered the stipulated record, and the arguments made on behalf of the parties in post-trial briefs through their respective counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Jerry Bowers ("Bowers") is employed by Defendant Utility Trailer Sales Company of Northern California (the "Company") as a Reefer Mechanic. Effective October 1, 1977 the Company and Plaintiff Machinists Automotive Trades District Lodge No. 190 of Northern California (the "Union") had entered into a collective bargaining agreement (the "Labor Agreement"). Bowers worked in the collective bargaining unit covered by, and was subject to the terms and conditions of, the Labor Agreement.

2. As is customary in the industry in which the Company is engaged and in which Bowers works, Bowers provided certain of his own tools needed to perform his normal duties. Because of their weight, it was impractical (although not impossible) for Bowers to remove his tools from the Company's premises on a regular basis.

3. Because its employees had their own tools, the Company required employees to submit tool inventories of their

tools, and required employees to submit to an inspection whenever tools were taken from the Company's premises in order to safeguard the tools for the employees' benefit; these procedures were not for the purpose of controlling the use or availability of the tools.

4. On Wednesday evening before the Thanksgiving weekend of 1977, Bowers locked up his tools inside the inner office in the Company's reefer shop, and secured the office with a locked metal bar that he had constructed. Over that weekend, one or more thieves broke into the reefer shop and stole, among other things, Bowers' tools. Bowers' loss of his tools was not in direct consequence of the discharge of his duties as an employee.

5. Bowers discovered the theft the following Monday and reported it to the Company's president, Mr. Bruce Myers. Bowers asked for reimbursement for his tools and Myers responded that he would submit the claim to the Company's insurance carrier and, if the claim was honored, Bowers would be paid. The insurance carrier rejected the claim, however, and the Company therefore refused to reimburse Bowers.

6. Pursuant to Article XIV of the Labor Agreement, Bowers filed a grievance with the Union seeking to require the Company to reimburse him for his stolen tools. The Company denied the grievance and the matter was submitted to arbitration. Following two days of hearings and full briefing by each side (including the Union's argument that reimbursement was required under California Labor Code Section 2802), the arbitrator issued a written Opinion and Award dated February 13, 1979 denying the grievance and finding that the Company was not obligated to reimburse Bowers under the Labor Agreement. Bowers and the Union then filed this action seeking reimbursement under Labor Code Section 2802.

7. Any finding of fact deemed to be a conclusion of law is hereby made a conclusion of law.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

1. The arbitrator's Decision and Award is not res judicata on the action asserted here under Labor Codes Section 2802, and the matter of reimbursement is properly before the Court.

2. Bowers did not suffer the loss of his tools in direct consequence of the discharge of his duties as an employee. He therefore is not entitled to reimbursement under Labor Codes Section 2802. *Earll v. McCoy*, 116 Cal. App. 2d 44 (1953).

3. In light of the Court's conclusions, the Court does not address the questions of waiver of rights under Labor Code Section 2804 or the preemption of Section 2802 by the National Labor Relations Act, as amended.

4. Any conclusion of law deemed to be a finding of fact is hereby made a finding of fact.

Dated: Jan. 22, 1981.

/s/ Robert L. Bostick
ROBERT L. BOSTICK
Judge of the Superior Court

Judgment.

Superior Court of the State of California for the County of Alameda.

Machinists Automotive Trades District Lodge No. 190 of Northern California & Jerry Bowers, Plaintiffs, v. Utility Trailer Sales Company, Defendant. Case No. 518020-8.

Filed: January 22, 1981.

This matter came before the Court for trial pursuant to a stipulated record before the Honorable Robert L. Bostick, Judge. The Court having considered the pleadings and evidence, and the arguments made on behalf of the parties in post-trial briefs through their respective counsel, the Court is of the opinion that Defendant is entitled to judgment as a matter of law, in accordance with the Findings of Fact and Conclusions of Law herein;

IT IS ORDERED AND ADJUDGED that Plaintiffs take nothing, that their action against Defendant be dismissed on the merits, and that Defendant recover its costs.

Dated: Jan. 22, 1981.

/s/ Robert L. Bostick
Judge of the Superior Court

APPENDIX D.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

May 19, 1983.

I have this day filed Order, Hearing Denied.

In re: 1 Civ. No. 53204, Machinists Automotive Trades vs. Utility Trailer Sales Company.

Respectfully,
Clerk

APPENDIX E.

Notice of Appeal to the Supreme Court of the United States.

Court of Appeal of the State of California, First Appellate District, Division Three.

Machinists Automotive Trades District Lodge No. 190 of Northern California & Jerry Bowers, Plaintiffs and Appellants, vs. Utility Trailer Sales Company, Defendant and Respondent. 1/CIV. 53204 (Sup. Ct. No. 518020-8).

Filed: July 27, 1983.

Notice is hereby given that Utility Trailer Sales Company hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Three reversing the judgment of the Superior Court. The decision of the Court of Appeal was entered in this action on March 21, 1983, following which the Supreme Court of the State of California denied hearing on May 19, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 25, 1983.

LATHAM & WATKINS
Richard W. Lund
Joel E. Krischer
Laurence Hummer
By Joel E. Krischer
Attorneys for Defendant and Respondent Utility Trailer Sales Company.

APPENDIX F.

Arbitrator's Award.

In the Matter of a Controversy between Machinists Automotive Trades District Lodge No. 190 of Northern California, Complainant, and Utility Trailer Sales Company, Respondent, involving theft of tools of Jerry Bowers. Joseph W. Garbarino, Arbitrator.

February 13, 1979.

Hearings: October 27, 1978
December 15, 1978

Briefs: February 2, 1979

Statement of the Issues

The parties agreed to a statement of the issues as follows:

1. Whether failure to provide tool insurance or pay for lost tools is a dispute pertaining to the interpretation or application of any identified provision of the Agreement:

2. If so, whether failure to provide tool insurance or to pay for lost tools is a violation of Article V, Section 3; Article VI, Section 1; Article X, Section 1; Article X, Section 2; or Article XXX, Section 4 of the Agreement.

Hearings were held on the dispute on October 27 and December 15, 1978. The Employer was represented by Latham & Watkins of Los Angeles, Joel E. Krischer appearing. The Union was represented by Van Bourg, Allen, Weinberg & Roger, David A. Rosenfeld appearing.

The parties agreed that the dispute was properly before the arbitrator for settlement, all requirements having been met or waived.

The Agreement language most relevant to this case is (Joint Exhibit 1): Article XXX.

Section 4. It is agreed that all matters subject to collective bargaining have been discussed and disposed of during the negotiations arriving at this contract, and both parties

agree that there shall be no further bargaining on any matter whatsoever during the life of this Agreement.

Article XIV. Grievance Procedure

Section 1. (b) The arbitrator shall be empowered to rule on all disputes pertaining to the interpretation or application on any identified provision of this agreement, provided, however, that he shall have no power to add to, to subtract from, modify any terms of this Agreement, or any other written agreement made supplementary hereto.

Background

The grievant works for Utility Trailer Sales Company of Northern California as a refrigeration or reefer mechanic. This work is performed in a building constructed of corrugated metal panels secured by bolts. Inside this building is another enclosed space with a door secured by a metal bar with padlocks.

As is customary in the industry, the grievant provided his own tools needed for performing his duties. These tools were contained in a large tool chest and in the aggregate weighed much more than could be conveniently moved from the premises by the grievant on a regular basis.

Over the Thanksgiving weekend 1977, the grievant locked his tools in the inner office. The door to the building was also locked. Over that weekend thieves broke into the building and stole the grievant's tools as well as several other items of property.

Entrance was apparently gained into the building by unbolting one metal panel and ripping back the panel by using a vehicle of some kind so that a person could enter the building and open the door from the inside. The thief or thieves then broke into the inner office and removed the tool chest by means of a hand-powered fork lift.

The theft was discovered on the Monday following the weekend by the grievant and reported to management. A claim for the loss was submitted to the Company's insurance carrier. The insurance rejected the claim. The loss claimed amounts to between $6,000 and $7,000. There is no claim that the Company had not provided reasonable security.

The Question of Arbitrability

The first issue to be decided is whether this is a dispute ". . . pertaining to the interpretation or application of any identified provision of the Agreement." (Article XIV-1.)

The Union has named five separate provisions of the Agreement which it believes covers this case. The Company denies that any of the five provisions is applicable. Each party presented an argument for the relevance or lack of relevance of each of the sections cited. There is no reason to analyze the pros and cons of the relevance of each of these "identified provisions" if any one of them proves a basis to settle the question of arbitrability. I have concluded that Article XXX, Section 4, provides such a basis.

The main thrust of the Union's case is that an agreement was reached during negotiations in which the Company accepted the concept of tool insurance "in principle" but stating that it would not place any language to this effect in the contract (Union Exhibit 8, p. 3). Article XXX, Section 4, is what is often called a "zipper" clause which states that ". . . It is agreed that all matters subject to collective bargaining have been discussed and disposed of during the negotiations . . ." The Union contends that the topic of reimbursement for tools was "disposed of" by the agreement by notation in the negotiation notes. The Company argues otherwise, holding that the whole purpose of a zipper clause is to exclude any subject from consideration not specifically included in the written agreement. The Union ar-

gues that having agreed "in principle" with the proviso that no language appear in the contract, the Company cannot use the absence of such language as proof that no such agreement was reached. My conclusion is that the Union has raised a legitimate question of agreement interpretation within the scope of the arbitrator's authority in arguing that the claimed separate agreement on tool insurance is a matter that was "disposed of" by an agreement "in principle" that would not become part of the Agreement.

Award on Issue #1

Failure to provide tool insurance or pay for lost tools is a dispute pertaining to the interpretation or application of an identified provision of the Agreement, specifically, Article XXX, Section 4.

Position of the Union on the Merits

During negotiations for the present contract, the Union made a demand for "Tool Insurance" as follows:

Tool Insurance: The Employer shall reimburse the employee for the loss of required hand tools and/or tool boxes due to fire, theft, or catastrophe on the Employer's premises, or while in the service of the Employer, less Twenty-five ($25.00) on each such loss, provided that such loss is not caused by the employee's negligence. Claims will be honnored only for tools and/or tool boxes which have been listed on an appropriate inventory form filed with the Employer. The employee shall notify the Employer whenever he removes his tools and/or tool boxes from the Employer's premises.

The Union agrees that the Employer has the right to institute reasonable rules for the purpose of providing protection against unwarranted claims under this Section. These rules shall include, but not be limited to, requirements for

tool inventories, audit of tool inventories, restrictions on the removal of tools from the Employer's premises and proper safeguarding of tools by employees.

Misuse or abuse of the foregoing provisions shall be considered cause for discharge.

The Union contends that:

1. On September 19, 1977 the Company responded to the proposal for Tool Insurance by agreeing in principle with the above demand as shown by the notation written by the Union negotiator on Union Exhibit 8, a marked up list of proposed changes in the Agreement.

Against the heading "Tool Insurance" appears the following: "9-19-77 Co. agrees in principle but no language in contract." Above this entry appears: "Co. no 9-23-77." and next to this: "10/6/77 CBM." It is undisputed that this last entry was written by C. Bruce Myers, company president and chief negotiator. (Page 3.)

2. The notation "Co. no" dated September 23 did not indicate a change in position from the 19th, but was simply a shortened repeat of the earlier position as testified to by the writer, the Union negotiator.

3. Two previous arbitration cases (Union Exhibits 9-10) clearly demonstrate that the Company's responsibility for bearing the risk of loss of tools in this industry is accepted by arbitrators in this area. The cases enumerate the doctrine of full replacement costs for tools stolen from the employer's premises when the tools are required to be provided as a condition of employment and the employee as a practical matter is unable to remove them from the premises after each working day. Both conditions apply in this case.

4. If the employer refuses to provide tool insurance then the employee must either provide his own insurance or else "self-insure" the loss. This violates Article X, Section 1

of the Agreement which prohibits requiring employees ". . . to take out insurance other than that required by law or this agreement."

5. Finally, past practice has been to provide reimbursement for stolen tools since 1971. The record shows (Employer Exhibits 1-5) that this practice goes back to 1971 and runs up to 1977.

6. Because of the existence of this past practice, the Union was willing to accept the agreement "in principle" referred to earlier without insisting on the inclusion of language in the Agreement.

7. The Union version of the discussion about the understanding in principle is supported by the clear recollection of two union negotiators and one of the management members of the bargaining team. The president's contrary testimony is incomplete and incredible.

The grievant should be reimbursed for his loss at full replacement value for all tools taken.

Position of the Company on the Merits

The Company contends that:

1. The agreement in principle did not refer to the tool insurance proposal, but to proposals discussed at the same time regarding physical security for tools. There was no discussion of past practice at the time.

2. The initialing of page 3 of Union Exhibit 8 by Mr. Myers was directed at the entry dated 9-23-77 which was only "Co. No" and no reference to "agreement in principle" is included.

3. The Union presented confused and contradictory testimony by the Union negotiator concerning what exactly was supposedly agreed to in principle. At one point the negotiator testified that the agreement was to consider cases

as they had been handled in the past, that is "on a case by case basis." (Tr. 56.)

4. The Union presented a lengthy and detailed proposal for tool insurance, including safeguards for the Company. Had management intended to agree they would certainly have wanted an explicit and careful statement of their liability included in the contract. If the Union interpretation is accepted, there is no reason for the Company position.

5. The Company provided adequate security for the work place of the grievant as shown by the extreme measures that the thief or thieves had to adopt in order to secure entrance and complete his mission.

6. This is a case which illustrates the common practice of Unions which fail to secure concessions in bargaining to then attempt to achieve the same end through arbitration of grievances. The inclusion of similar provisions on reimbursement in other agreements in the industry shows that this is a common subject of negotiations. In the absence of similar language nothing in the present Agreement permits the arbitrator to award reimbursement. The great majority of arbitrators' decisions on these cases support this view.

7. Past practice does not support the position of the Union. There are five documented cases of stolen tools only one of which occurred in recent years while Mr. Myers was the company president (Employer Exhibits 1-5). In one instance reimbursement was made ($145 approximately) in light of special conditions and without establishing precedent. Another case was "settled," precise disposition uncertain. No reimbursement was made in a third case. In the fourth case a loan was made which was forgiven on condition of continued employment for six months. The last case was settled for $1,200 of a $2,600 claim without establishing a precedent.

This record shows the variability of the methods adopted for settling these cases. There is no consistent past practice.

8. The fact that the Union demanded Tool Insurance in negotiations shows that it did not believe it had such protection in the past and shows that they did not think a past practice had been established.

9. There is nothing in the Agreement, in the record of what was done in negotiations, in arbitral precedent, or in past practice that would justify a conclusion that reimbursement should be ordered.

Discussion on the Merits

As a starting point, the Union's contention that the refusal of the Company to provide tool insurance[1] amounts to a violation of the prohibition of requiring the purchase of insurance by employees (Article X-1) because it amounts to requiring self-insurance does not appear relevant to the decision. There is no evidence whatever that this is the kind of situation contemplated by that inclusion of that language or that self-insurance of this form is included.

Whatever the merits of the two arbitration decisions represented by Union Exhibits 9 and 10 in the contexts of the cases themselves, there is no basis in the contents of the present agreement governing these proceedings that would justify adopting the approach they represent. They represent two decisions by one arbitrator in 1965 and 1973 respectively, which are clearly in the minority of the other cases dealing with this range of questions that have been cited and reviewed by the present arbitrator.

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[1]Although the proposal is continually described as "Tool Insurance" and will be so referred to herein, it actually calls for straight reimbursement of loss rather than formal insurance.

In the original statement of Issue #2 reference was made to five separate sections of the Agreement. As the case developed and as the Union brief demonstrates the main thrust of the Union's argument was later narrowed and clarified. As the summary of the Union's position on the merits indicates, there was little or no reference to Article V-3, Loss of Seniority; Article VI-1 Discharge of and Discrimination Against Employee, or Article X-2, Reduction of Wages. No reference to these Articles was made in the Union Brief except insofar as the discussion of past practice implied some form of discrimination against this grievant. No explicit discussion of possible discrimination for Union activity or failure to purchase securities or other actions included in Article VI, Section 1 appears in the Brief. There is, therefore, no reason to analyze the question of whether a violation of these specific provisions occurred.

The main thrust of the Union's case centered on two lines of argument which are interrelated:

1. The *agreement in principle* represented by the notation on the marked up version of the proposals of the Union in Union Exhibit 8. The testimony concerning the interpretation of these notations was extensive, conflicting on occasion, and to some extent inconsistent within the same witness' testimony. There is a question as to whether the agreement in principle applied to the provision of physical security, the continuance of past practice, or the provision of tool insurance. The Company contends that whatever was agreed to on 9-19-77 was withdrawn on 9-23 as proved by the second notation limited to "Co. No." This interpretation receives some support from the fact that the entry for tool insurance on page 3 is followed immediately by separate entries for funeral leave and uniforms, each of which also carries a notation of "Co. No" for 9-23. No claim has been made that anything else was intended by those notations.

Even if the Union's position that "Co. No" on tool insurance for 9-23 was only a short version of the "no language in contract" proviso attached to the 9-19-77 entry is accepted, it leaves unanswered the question of why language should not have been placed in the agreement in the face of the intention of the zipper clause.

In view of the lack of clarity as to what was agreed to on 9-19, the possible withdrawal of that agreement on 9-23, the unusual nature of the claim by the Company in agreeing but keeping the language of the agreement out of the contract, the principle that oral agreements in general are merged into the written agreement, and the inclusion of a zipper clause, all lead to the conclusion that this evidence alone cannot support a decision in favor of the Union.

2. *Past practice.* The record as to past practice shows:

a. 2-71. Reimbursement of $145 plus tools with a reference to "special conditions" and a statement that "no precedent finding on either side" is created. (Employer Exhibit 1.)

b. 9-71. Apparent reimbursement of $150. The Company claims that the disposition of this case is on "terms unknown," but a letter from the Union on 10-22-71 acknowledges receipt of $150. (Employer Exhibit 2.)

c. 8-72. A claim of $263.20 was made, but the record does not show any further action. (Employer Exhibit 3.)

d. 8-73. In response to a claim of $534.33, a loan was made to the employee with the proviso that it would be forgiven if the employee worked six months. This was, in effect, a delayed, reimbursement. (Employer Exhibit 4.)

e. 11-77. A claim for $2,600 was settled by negotiation for $1,200 after a Board of Adjustment deadlock. The employee signed a statement acknowledging

the company's position that the "settlement shall not be considered as establishing a precedent." (Employer Exhibit 5.)

In short, all five cases were handled as grievances and settled by negotiation. Two relatively small claims resulted in clear-cut reimbursements, one case resulted in a forgiven loan contingent on continued employment and is similar to a reimbursement. One relatively small claim apparently did not result in any reimbursement. By far the largest and the only recent claim was settled through negotiation for something under half of the claimed amount. The Company attempted to make explicit that payment of the first and last claims did not create a precedent. In the largest claim, the Company stated that it settled for an amount that represented approximately what its cost would have been for an arbitration preferring that the employee receive the money. The Company claims that it conceded on another issue to keep tool insurance out of the Agreement. (Tr. 28, 41.)

This record does not support the claim that a past practice exists that would justify finding for the Union.

A careful review of all the evidence leads to the conclusion that the following is the most likely explanation of the events of this case. As in much of the industry tool thefts are a substantial problem. The Union has tried to achieve "tool insurance" in its agreement without success. As thefts have occurred, the Union has prosecuted them as grievances with considerable, but not universal, success as far as the smaller claims are concerned. The Company has been willing to reimburse relatively small claims, but has refused to agree to a blanket reimbursement policy. The Company goal has been to maintain a case by case approach, which will permit it to consider special conditions and to limits its exposure to loss. Whether withdrawn or not, the "agreement in principle but no language in the contract" notation is

consistent with this interpretation as is most of the other evidence.

Given the character of the record of past practice, the failure of the attempt to add a reimbursement policy to the Agreement in negotiations, and the limited substance, if any, of the claimed oral agreement, a decision in favor of the Union is not appropriate under the arbitrator's authority under the Agreement.

Award on the Issue #2

The failure to provide tool insurance or to pay for lost tools is not a violation of Article V, Section 3; Article VI, Section 1; Article X, Section 1; Article X, Section 2; or Article XXX, Section 4 of the Agreement.

/s/ Joseph W. Garbarino
JOSEPH W. GARBARINO
Arbitrator

February 13, 1979

Van Bourg, Allen, Weinberg & Roger, A Professional Corporation, 45 Polk Street, San Francisco, California 94102, Telephone (415) 864-4000.

February 23, 1979

Joseph Garbarino
7708 Ricardo Court
El Cerrito, CA 94530

Dear Mr. Garbarino:

The purpose of this letter is to request that you reconsider your decision issued February 13, 1979.

There are two bases for this request for reconsideration. You have fundamentally misunderstood the language of the so-called "zipper clause", Article XXX, Section 4. That clause states simply that all matters subject to the collective bargaining agreement have been discussed and disposed of during the negotiations . . ." It does not say that anything which is not contained in the contract does not represent either past practices and/or agreement between the employer and the union.

We believe the record clearly demonstrates that the company agreed to maintain the tool insurance program although it refused to put it in the contract. This seems to me to be a clear disposition of that matter without embodying the agreement within the collective bargaining agreement. The "zipper clause" is not one which prohibits agreement on those matters not specifically contained in the agreement. To the contrary, it simply means that the parties are not obligated to bargain over anything further during the terms of the contract.

In light of what I believe is your misunderstanding of the use of the "zipper clause", you should reconsider your decision and make a determination as to whether the employer and the union agreed that tool insurance would con-

tinue but that it would not be contained in the contract.

Second, you have totally ignored our argument that the decision of Robert Burns governs this case. His decisions, in the same industry and the same location, hold that an employer must provide for tool insurance or provide tools where tools are necessary in the performance of employees duties. The employer conceded in this case that absent tools, Bowers would be discharged. That is precisely why Burns determined that within this industry, employers must either provide tools or insure them.

You have failed to comment on this argument and I believe on that basis, you should reconsider your decision.

Sincerely,
David Rosenfeld

Institute of Business and Economic Research, 156 Barrows Hall, Berkeley, California 94720.

March 2, 1979

Mr. David Rosenfeld
Van Bourg, Allen, Weinberg and Roger
45 Polk Street
San Francisco, California 94102

Dear Mr. Rosenfeld

As I noted in my decision in the Bowers case, I proceeded on the assumption that the union's claim rested on two bases:

1. That an oral agreement existed that supplemented the written agreement and that this is supported by past practice. Even if the company claim that it rescinded the agreement in principle is ignored, and the union's representation is accepted, I concluded that the record of the case and of past practice both led to a conclusion that there was no intention of guaranteeing full reimbursement of all tool loses intended by the company. The union proposal was more limited in ited in effect than the meaning the union now attaches to the alleged oral agreement. The fact that the company refused to accept this proposal and also refused to put *any* language in the agreement clearly indicates that they had no intention of acquiescing to full reimbursement. On the basis of the record and my analysis of past practice, I concluded that the company intended to continue a policy of reimbursment on a case by case basis, not reimbursing in at least one case, reimbursing in full in others, reimbursing conditionally in others, and paying partial reimbursement in another. I might add that your remark that we would not have been in arbitration if the claimed loss had been substantially smaller is also consistent with this interpretation.

2. The Burns' decision. In view of the limited role of precedent in arbitration, I hoped to save time for the arbi-

trator and money for the parties by not engaging in detailed analyses of the cases cited in the record. If this issue were being considered for the first time I would have considerable sympathy for the Burns' approach to the equities of the situation. But this problem has a long history that cannot be ignored by an arbitrator operating in the context of the arbitration process.

The issue of tool insurance was raised in negotiations, it has been covered in other agreements by this local, and in other agreements by other locals in this and other areas. Accepting the Burns approach would make all this irrelevant. The question has been considered in arbitration for years. As a general statement and ignoring the bailment issue which figures in several of the cited cases, the clearcut conclusion of the great bulk of cases has been that employees are liable for losses absent specific language to the contrary. On the other side are two decisions by a single arbitrator over a span of twelve years. In the circumstances, I feel my decision is the correct one.

Sincerely,

/s/ J. W. Garbarino
J.W. GARBARINO
Arbitrator

APPENDIX G.

Constitutional Provisions and Statutes.

Article VI, Second Clause, United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1, National Labor Relations Act (29 U.S.C. § 151):

> . . .
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 8, National Labor Relations Act (29 U.S.C. § 158):

> (a) It shall be an unfair labor practice for an employer —
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, ...
>
> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> . . .

(3) to refuse to bargain collectively with an employer,

. . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Section 2802, California Labor Code:

An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

No. 83-280

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UTILITY TRAILER SALES COMPANY,
Appellant,

VS.

MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA and JERRY BOWERS,
Appellees.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS OR AFFIRM

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November 7, 1983

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I. COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether a State Law Requiring Employers to Idemnify Employees for Any Expenses Incurred by the Employee, Including the Loss of Tools Supplied by the Employee, Is Preempted by the Obligation to Bargain Contained in the National Labor Relations Act

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UTILITY TRAILER SALES COMPANY,
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MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA, and JERRY BOWERS
Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

II. COUNTERSTATEMENT OF THE CASE

Although the statement of the case contained in Appellant's Jurisdictional Statement is largely correct, we emphasize the relevant facts with respect to whether a substantial federal question is presented by this appeal.

Appellees, a labor organization and Jerry Bowers, an individual worker, sought relief under a state statute providing generally that employers must indemnify employees for any loses which they incur in the course of their employment. California Labor Code, Section 2802. After the trial court ruled against the union and the employee, an appeal was filed with the California intermediate appellate court which reversed. The court held that the statute required the employer to reimburse Mr. Bowers for those tools which he utilized in the course of his employment as a mechanic but which were stolen during a holiday weekend.

The question presented is

whether that statutory provision is preempted by the general obligation to bargain contained in the National Labor Relations Act where, in fact, the union and employer had bargained over the issue of tool insurance but had been unable to reach any agreement requiring that employer under the terms of the collective bargaining agreement to reimburse any mechanic whose tools were stolen or lost.

As we shall show, no substantial federal question is presented by way of this appeal for it is well settled that the states may legislate in areas affecting of employees so long as the states do not legislate so as to regulate the bargaining process.

III. THE STATES MAY REGULATE THE EMPLOYMENT RELATIONSHIP SO LONG AS THEY DO NOT REGULATE THE COLLECTIVE BARGAINING PROCESS

California Labor Code Section 2802 provides:

An employer shall indemnify

> his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

That statute applies to a variety of circumstances generally requiring employers to indemnify or reimburse employees for expenses which they incur as a result of their employment. For example, it applies to a newspaper reporter who must defend a libel action brought as a result of a story which he gathered in the course of his employment. Douglas vs. Los Angeles Herald-Examiner 50 Cal App. 3d 449 (1975).

It is part of many provisions of the California Labor Code regulating the employer-employee relationship. The comprehensive legislation governs such matters as the time and manner of

payment of wages, the obligation to provide workers compensation coverage, prohibitions against lie detectors, the right of employees to see their personal files and many other statutes directed to protecting workers in their employment relationship. The statutes cover all employees whether managerial, supervisory or hourly paid and irrespective of whether they are covered by a collective bargaining agreement or not.

In this case, the compelling public benefit behind labor protection 2802 is to prevent employees from becoming either insurers of the capital assets of their employers or replacing capital asets.

The preemption argument raised by the employer was rejected by the California appellate court with a brief reference to Industrial Welfare Commission vs. Superior Court 27 Cal. 3d 690, appeal dismissed and cert denied, 449 US 1029 (1980). The appellate court needed no extensive

discussion for the Welfare Commission case extensively reviewed this issue and decisively rejected the premption argument. Because the reasoning of the court was so clear we repeat it with deletions of certain footnotes and citations:

> A number of employers additionally contend that a variety of state and federal labor relation statutes, which have as a principal objective the resolution of employer-employee disputes over wages, hours and working conditions through the collective bargaining process, operate to "preempt" the IWC from "imposing" or "dictating," upon either employers or employees, conditions of employment that have not been arrived at through collective bargaining. Relying upon a number of labor law decisions which have indicated in other contexts that neither the National Labor Relations Board nor similar state agencies may "impose [their] own views of a desirable settlement" in the event of

a dispute over employment conditions [citation omitted] the employers maintain that the IWC lacks authority to "interfere" with the collective bargaining process by mandating minimum permissible employment conditions in matters that are "mandatory subjects" of collective bargaining under the applicable labor statutes.

Taken at face value, the employers' contentions in this regard would have the effect of precluding the IWC from regulating with respect to any of the matters within its jurisdiction. Under each of the labor statutes which apply to the industries regulated by the commission--the National Labor Relations Act, and the Railway Labor Act, and the Agricultural Labor Relations Act--"wages, hours and working conditions" constitute mandatory subjects of collective bargaining. Thus, if these labor statutes in fact prohibited all governmental regulation on any matter that is subject to employee-employer

bargaining, neither the IWC nor any other state or federal agency would have authority to prescribe minimum wages or maximum hours, to promulgate occupational health and safety standards, or to prohibit discriminatory employment practices. The mere recitation of the logical consequences of the employers' argument, of course, signals the extreme tenuousness of the employers' contention.

In fact, the fundamental flaw in the employers' present argument was fully exposed nearly 30 years ago by Justice Jackson in his opinion for the United States Supreme Court in Terminal Assn. v. Trainmen (1943) 318 U.S. 1. In Terminal, an employer covered by the Railway Labor Act challenged the validity of a state agency regulation which, to protect the health and safety of employees, required the company to provide cabooses on designated railroad runs. The employer in Terminal pointed out that the state regulation conflicted with a

specific provision of a collective bargaining agreement that had been negotiated between the employer and employees, and argued that since the question of providing cabooses involved a working condition of the employmnent and thus was a "mandatory subject" of collective bargianing subject to resolution under the Railway Labor Act, state regulation on the subject was prempted by the act.

In Terminal, the Supreme Court unanimously rejected the employer's contention and upheld the validity of the state regulation. In reaching this conclusion, Justice Jackson explained: "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. . . .

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which

would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State . . . from making the order in question."

This reasoning, we believe, fully answers the employers' contention that federal or state labor legislation, fostering collective bargaining, can be read to preempt legislative efforts to prescribe minimum standards of wages, hours and working conditions for the protection of employees. Indeed, as already suggested, the numerous existing federal and state statutes embodying just such "minimum standards" stand as eloquent testimony to the validity of such regulation. Thus, notwithstanding the NRLA and the RLA, the federal government has enacted the Fair Labor Standards Act of

1938 prescribing minimum wages and maximum hours, and the Occupational Safety and Health Act of 1970, authorizing the promulgation of specific standards directly relating to workers' conditions of employment. Moreover, both the Fair Labor Standards Act and federal OSHA contain specific provisions which recognize the states' authority to go beyond the federal legislation in adopting more protective regulations for the benefit of employees.

Furthermore, although the employers argue that state regulation in this field--if permissible at all--must be confined only to matters of minimum wages, maximum hours or working conditions which directly implicate the health or safety of employees, federal and state legislation directed to discrimination in employment demonstrates that governmental entities retain broad authority to establish minimum standards related generally to the "welfare" of employees.

As the Terminal case teaches, the fact that these matters may also constitute proper, indeed mandatory," subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table. /16

/16The numerous labor law preemption decisions relied uon by the employers are clearly not in point. None of the decisions dealt with a state regulation prescribing a minimum standard for working conditions to protect the health, safety or welfare of employees. Instead, the cases involve either direct state intereference with the collective bargaining process (see, e.g., California v. Taylor (1957) 353 U.S. 553 or with the choice of economic weapons available during a labor dispute (see e.g., Machinists v. Wisconsin Emp. Rel. Comm'n

supra, 427 U.S. 132), or the state's use of its antitrust laws to bar the collective action by employees or employers protected by federal law. (See e.g., Teamsters Union v. Oliver (1959) 358 U.S. 283) As the United States Supreme Court recently observed: "[A]lmost all of the Court's labor law decisions in which state regulatory schemes have been found to be preempted have involved state efforts to regulate or to prohibit private conduct that was either protected by Section 7 [of the NLRA], prohibited by Section 8 [of the NLRA], or at least arguably so protected or prohibited." (New York Tel. Co. v. New York Labor Dept. (1979) 440 U.S. 519, 529)

Contrary to the employers' contention, the Supreme Court has never retreated from its holding in Terminal, quoted above, that the federal labor laws do not "preempt [ ] ...the field of regulating working conditions...." (318 U.S. at p. 7 See, e.g., Malone v.

White Motor Corp. (1978) 435 U.S. 497, 504-505, 512; Baltimore & O. R. Co. v. Commonwealth Dept. of L. & I., supra, 334 A.2d 636, app. dism. for want of a substantial federal question, 423 U.S. 806.)

> Accordingly, we conclude that existing federal and state labor statutes establish no bar to the IWC's promulgation of the 1980 wage orders (citations omitted)"
> 27 Cal 3d at 725-730

Although this case presents a circumstance where the union sought tool theft insurance in bargaining and was unable to reach an agreement with the employer it does not undermine the principle that California has legitimate and compelling reasons to legislate in the area of employee indemnification and it does not interfere with the collective bargaining process. For as the California court noted, such labor legislation does not prohibit the employer and the union from negotiating an alternative solution to the problem of lost or stolen tools so long as that solution does not eliminate the minimum standards provided for in Labor Code Section 2802.

The Appellant's reliance upon

Local 24 IBT vs. Oliver 358 U.S. 283 (1959) is misplaced. For that case dealt with antitrust regulation which voided an important provision of the Teamster agreement which protected the negotiated wage scale by limiting the circumstances under which an owner would drive his leased vehicle for a motor carrier. Thus there was no state interest in welfare but commercial regulation related to antitrust concerns. Indeed, no court since that date has invalidated the type of state labor legislation on the ground of preempt except where that legislation regulates the bargaining process. Cf Machinists vs. Wisconsin Employment Relations Commission 427 U.S. 132 (1976). Moreover, this Court has recently reaffirmed the right of states to regulate the employment relationship so long as the regulation does not directly conflict with any rule established under the National Labor Relations Act. See Belknap,

Inc. vs. Hale __U.S.__, 77, L.Ed. 2d 798 (1983), Sears, Roebuck & Co. vs. Carpenters 436 U.S. 180 (1970), and Bill Johnson's Restaurants, Inc. vs. NLRB __U.S.__76 L.Ed. 277 (1983). Indeed as these cases indicate this Court has substantially narrowed these areas where the states may not regulate. See also New York Telephone Co. vs. New York Labor Dept. 440 U.S. 519 (1979)

In summary, California Labor Code Section 2802 serves a very legitimate state interest providing minimum conditions of employment whereby employees are not required to act as the insurer of the employer's business. It is part of the minimum welfare regulation which this court long ago sanctioned in respect to the workplace and which does not interfere with the collective bargaining process for it leaves the parties free to create other solutions to the question of providing tools within the framework

of this minimum welfare legislation. No issue warranting review by this Court is represented.

IV. NO ISSUE IS PRESENTED IN THE JURISDICTIONAL STATEMENT WITH RESPECT TO THE EFFECT OF THE ARBITRATION DECISION

Amici Curiae suggest that a different issue is presented to this Court with respect to the effect of the arbitrator's award finding that there was no contractual arrangement whereby the employer agreed to reimburse Mr. Bowers for his stolen tools. See Brief Amici Curiae, page 11-15. This issue was not presented in the Jurisdictional Statement and therefore review by this Court is precluded. Supreme Court Rule 15.1

In any case, Amici Curiae concede that this Court has repeatedly held that, notwithstanding the existence of a favorable or unfavorable arbitration award, employees may proceed to seek independent statutory rights where the arbitration award does

not purport to resolve those statutory rights, but only rights under the collective bargaining agreement. See Alexander vs. Gardner-Denver Co. 415 U.S. 36 (1974) and Barrentine vs. Arkansas-Best Freight System Inc. 450 U.S. 728 (1980).

In this case Arbitrator Garbarino was not asked to, and he did not, purport to resolve the applicability of Labor Code Section 2802 to this dispute. He only resolved the question of whether there was a contractual obligation.

Thus there was no interference with the general labor policy in favor of arbitration where the statutory right enforced by the California court has nothing to do with the collective bargaining agreement. Cf. W. R. Grace & Co. vs. Local 759 __U.S.__, 76 L.Ed. 2d 298 (1983) (Arbitrator's decision conflicting with conciliation agreement under Title VII is enforceable)

V. CONCLUSION

For the reasons suggested above, the appeal should be dismissed and the decision of California District Court of Appeal affirmed. Should this Court treat the appeal as a petition for writ of certiorari, it should be denied.

DATED: November 7, 1983

Respectfully submitted,

VAN BOURG, ALLEN, WEINBERG, & ROGER
A Professional Corporation

By _____
DAVID A. ROSENFELD
Counsel of Record

Attorneys for Appellees

MACHINISTS AUTOMOTIVE TRADES TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA, and JERRY BOWERS

No. 83-280

IN THE

Supreme Court of the United States

October Term, 1983

UTILITY TRAILER SALES COMPANY,

Appellant,

vs.

MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA, and JERRY BOWERS,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS ASSOCIATION, AND CALIFORNIA ASSOCIATION OF EMPLOYERS IN SUPPORT OF JURISDICTIONAL STATEMENT.

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BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS ASSOCIATION, AND CALIFORNIA ASSOCIATION OF EMPLOYERS IN SUPPORT OF JURISDICTIONAL STATEMENT.

Description of Interest of Amici Curiae.

The Merchants and Manufacturers Association is a non-profit California corporation whose purpose is to augment the human resources management of member firms. Over 2,600 companies of varying sizes and in diverse industries are members of the Merchants and Manufacturers Association. These members collectively employ over one million employees in the State of California.

The National Association of Manufacturers is a non-profit voluntary business organization organized under the laws

of the State of New York. It has a membership of over 13,000 manufacturing and related business concerns which, in the aggregate, produce an estimated 80% of all goods manufactured in the United States.

The California Manufacturers Association is a non-profit corporation representing approximately 800 manufacturers and processors in California. Its primary function is representing its members before the California Legislature and before various regulatory agencies which affect manufacturers.

The California Association of Employers is a non-profit association of small and medium-sized employers in California. Its membership of approximately 1,600 California employers collectively employs over 35,000 workers.

For purposes of convenience, all four amici will be referred to collectively as "the Associations" throughout this brief.

Many of the Associations' members are parties to collective bargaining agreements with unions in California, and throughout the United States. Because of the great diversity of their members, the Associations have a strong interest in preserving the federal policy of allowing an individual employer and an individual union to arrive at their own unique solutions to the problems they face through good faith bargaining. The decision below is a frontal attack on this policy. The court below held that *all* California employers must reimburse employees for lost tools, even if the collective bargaining agreement, as interpreted by an arbitrator, provides to the contrary.

The Associations also strongly believe that only a uniform federal labor law will produce stability in labor relations. Federal preemption of contrary state laws is essential to the preservation of this stability. The Associations therefore

oppose any state regulations which impose a single uniform provision upon all employers and unions, no matter what their individual needs or interests. State laws which interfere with the free flow of collective bargaining are by definition harmful to employers such as the Associations' members.

Additionally, many of the Associations' members are parties to collective bargaining agreements which call for final and binding arbitration of disputes. These members strongly oppose any erosion of the important principle that the results of final and binding arbitration pursuant to a collective bargaining agreement may not be relitigated in a de novo court action. The instant case represents a dramatic departure from that principle. Although an arbitrator had rejected Mr. Bowers' claim for reimbursement for lost tools, the court below held that he could pursue a court action seeking reimbursement, thereby rendering the arbitration a useless exercise in futility. For these reasons, the Associations support the Jurisdictional Statement of Appellant Utility Trailer Sales Company.

Consent of Parties.

The parties to this action have consented to the filing of this brief by amici curiae. The parties' written consent will be filed with the Clerk of the Court concurrently.

Statement of the Case.

Amici curiae respectfully adopt the Statement of the Case set forth in the Jurisdictional Statement of the Appellant Utility Trailer Sales Company, as well as Appellant's description of the Parties Below, Opinions Below, Jurisdiction, Constitutional Provisions and Statutes, and the Question Presented.

THE QUESTION IS SUBSTANTIAL.

I.

A State May Not Dictate the Terms of a Collective Bargaining Agreement to Unions or Employers Engaged in Commerce.

In the instant case, the State of California has in effect dictated one of the terms of the collective bargaining agreement between the parties, *viz.*, a requirement that the employer will reimburse employees for lost tools. As the record makes clear, and as a neutral arbitrator found, the union proposed tool loss reimbursement, and the parties bargained about this issue. The union did not achieve its demands, and no tool loss reimbursement article appears in the collective bargaining agreement. A neutral arbitrator therefore determined that under the collective bargaining agreement tool reimbursement is not required. Thus, the State has here invalidated the results of collective bargaining, and imposed a term upon the parties directly contrary to the results of negotiation.

This case raises a substantial question of federal preemption, for federal labor law preempts state attempts to prescribe terms and conditions of employment. The question is substantial, for if a state can dictate *one* term of a collective bargaining agreement, in this case tool loss reimbursement, then a state can dictate *all* terms of a collective bargaining agreement. If the decision below stands, then there is nothing to stop a state legislature from imposing other terms on the parties. For example, notwithstanding the terms of a collective bargaining agreement, a state could require an employer to agree to a union security clause, a grievance and arbitration system, bereavement leave or sick pay. For that matter, a state could enact a "Uniform Collective Bargaining Agreement Act," in which all terms and

conditions of employment would be set forth, and the only blanks left for the parties to fill in would be their names.

Such a system was clearly not intended by Congress. In enacting Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), Congress made clear that while parties were obligated to bargain in good faith, neither party could be forced by the National Labor Relations Board (NLRB) or the courts to agree to a particular proposal or to make a particular concession. Similarly, this Court has consistently declared that *states* may not require an employer to include a particular term in a collective bargaining agreement. As the Court explained, "state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . ." *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 153 (1976). Such state laws are therefore preempted by federal labor law.

In the leading case of *Teamsters v. Oliver*, 358 U.S. 283 (1959), the Court held that an Ohio antitrust law could not be applied "to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." 358 U.S. at 295. The Court explained that "there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." 358 U.S. at 296.

This principle has been reaffirmed in several post-*Oliver* decisions. In *Machinists v. Wisconsin Employment Relations Commission*, *supra*, the Court held that federal law preempted a state agency's ruling prohibiting a union from refusing to work overtime. The Court, quoting *Oliver*, noted that "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the

inconsistent application of state law is necessarily outside the power of the state." 427 U.S. at 153.

The *Oliver* principle was cited in dicta in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978). The Court there held that a pre-ERISA Minnesota statute which regulated the terms of a pension plan was not preempted, but *only* because of Congressional intent to preserve state authority in this limited area. But for such specific intent, the statute would be preempted under the principle set forth in *Oliver*. Indeed, the Court quoted at length from *Oliver*, noting that "[t]he Oliver opinion contains broad language affirming the independence of the collective-bargaining process from state interference." 435 U.S. at 513.

More recently, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court again cited *Teamsters v. Oliver* with approval in dicta. The Court held that, following the enactment of ERISA, a New Jersey law regulating pension benefits was preempted. After determining that the state law was preempted by ERISA, the Court went on to note that even aside from ERISA, the state law would have been preempted by federal labor law:

> "Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in *precluding state interference with labor-management negotiations* calls for pre-emption of state efforts to regulate pension terms. See Teamsters v. Oliver." (Citation omitted). 451 U.S. at 525. (Emphasis added)

Just as federal law preempts state regulation of pension plans, so too it preempts regulation of other terms and conditions of employment about which unions and management are directed to bargain. Tool reimbursement, as the court below acknowledged, is a condition of employment, about which the parties must bargain. In fact, as the arbitrator noted in a letter to the parties, many collective bargaining

agreements contain provisions concerning tool reimbursement. (See Appellant's Jurisdictional Statement at 40.) Because tool loss reimbursement is a "subject matter as to which federal law directs [the parties] to bargain," state laws dictating the results of their bargaining are preempted.

In summary, for more than 20 years since *Oliver*, the Court has consistently held that a state may not regulate the substantive terms of a collective bargaining agreement. In the instant case, California Labor Code § 2802, as construed by the California Court of Appeal, directs employers to reimburse employees for lost tools even if, as in this case, the collective bargaining agreement as interpreted by an arbitrator does not provide for reimbursement. Unless such laws are preempted, the federal labor policy enunciated in *Oliver* and its progeny would be severely undercut. Moreover, as Appellant points out in its Jurisdictional Statement, state courts need direction from this Court in enforcing the preemption principles enunciated in *Oliver*. State courts have allowed state regulations to stand in spite of the principles in *Oliver*. This case provides an opportunity for the Court to correct these erroneous decisions.

A related reason why the federal question is substantial in the view of the Associations is that collective bargaining, as Congress envisions it, is a flexible system. Federal labor policy recognizes that there is no one ideal collective bargaining agreement, and no ideal set of terms and conditions of employment. Rather, individual employers, and the representatives of their employees, together determine the appropriate conditions of employment to meet their specific needs. As this Court has stated:

> "It must be realized that collective bargaining, under ***a system where the Government does not attempt to control the results of negotiations***, cannot be equated with an academic collective search for truth — or even

> with what might be thought to be the ideal of one. The parties — even granting the modification of views that may come from a realization of economic interdependence — still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).

"Ordering and adjusting" the competing interests of employers and employees by voluntary agreements is "the keystone of the federal scheme to promote industrial peace." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Because ours is a system in which "the Government does not attempt to control the results of the negotiations," California and other states cannot be permitted to legislate specific terms and conditions of employment.

The instant case is a perfect example of how the collective bargaining system created by Congress is meant to work. The union sought to attain a specific proposal: tool loss reimbursement. As a neutral arbitrator determined, the parties bargained about the issue, the union could not attain its proposal, and the union nevertheless signed the contract. If this issue is important enough to the union, it may raise it again. Perhaps it will make a concession in another area, or engage in a lawful strike to achieve this proposal. If it does so, it will be up to the company to determine how significant this provision is to them. In any event, it is up to these two parties to work the problem out. That is the system Congress created.

The California law at issue here would undermine this system. It would require *all* employers to provide tool loss reimbursement, whether or not the issue was important to them or to their employees, whether or not the union had given some *quid pro quo* to obtain it, and, as in the instant case, whether or not it was contrary to the parties' agreement. Such a law ignores the most fundamental principle

of federal labor law, which is that the parties should determine their own agreements. Whether or not tool loss reimbursement is a good idea is quite beside the point. If a system in which the Government does not attempt to control the results of collective bargaining is to be preserved, then each employer and union should be free to determine if tool loss reimbursement, or any other specific term, is a good idea in their own situation.

II.

Labor Code § 2802 Does Not Involve Employees' Health or Safety, or Establish Minimum Standards to Protect Employees' Welfare.

Appellees will no doubt contend that the federal preemption principles set forth above do not apply to state laws which protect employees' health and safety or which establish minimum standards of employee welfare. Appellees may cite *Terminal Association v. Trainmen*, 318 U.S. 1 (1943) for the proposition that the state, under its police power, may regulate employees' health and safety notwithstanding contrary principles of federal preemption. Additionally, Appellees may cite the California Supreme Court's decision in *Industrial Welfare Commission v. Superior Court*, 27 Cal. 3d 690, 166 Cal. Rptr. 331 (1980) for the proposition that a state may adopt "minimum standards to protect the welfare of workers." 27 Cal. 3d at 728. These cases, however, have no applicability to § 2802, which is neither a health and safety regulation nor a minimum standard of employee welfare.

First, the question of whether or not an employer must reimburse an employee for lost tools is purely an economic one: whose insurance carrier will pay for the loss, or who will pay in the absence of insurance. The question is economic only, and has no relationship to an employee's health

or safety. Thus, the health and safety exception recognized in *Terminal Association* has no application to this case.

Second, the statute also does not establish minimum standards for employee welfare.* In this case, Labor Code § 2802, as construed by the Court of Appeal, requires an employer to reimburse an employee for the value of the employee's own tools. The statute does not provide for reimbursement up to the reasonable value of standard replacement tools. Rather, the statute as the court construes it would require reimbursement no matter what the value of the particular set of tools. This is not minimum protection: it is a free-of-charge insurance policy, which would insure the loss of even the most expensive tools. The record below reveals, in fact, that Mr. Bowers' tools were much more costly than a standard set of tools. As the court below construed the statute, full reimbursement was still required. That hardly constitutes "minimal" protection.

Moreover, in 1980, the California Industrial Welfare Commission, whose duty it is to establish minimum standards of protection, *Industrial Welfare Commission v. Superior Court, supra*, 27 Cal. 3d at 700, issued an elaborate set of Wage Orders which established many different minimum standards for employee protection. The Commission's Orders did *not* call for tool loss reimbursement under the circumstances of this case.

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*The Associations do not in any way concede that an exception to federal preemption exists for state laws establishing "minimum standards." This Court has never recognized such an exception. The California Supreme Court's determination that the "health and safety" exception recognized in *Terminal Association* extends to any "minimum standards" regulation is, in the Associations' view, wholly unwarranted. Nevertheless, for purposes of this Brief, the Associations are willing to assume that a "minimum standards" exception exists because, as set forth below, even if such an exception exists, it does not encompass tool loss reimbursement.

Industrial Welfare Commission Order 1-80-3, Section 9(B) requires an employer to *provide and maintain* tools for certain employees, if the tools are necessary to perform the job. However, an employee whose wages are more than two times the minimum wage "may be required to provide and maintain hand tools and equipment customarily required by the trade or craft." Mr. Bowers earned more than two times the minimum wage. Therefore, the Industrial Welfare Commission, in establishing minimum standards, did not require the employer to *provide and maintain* tools for Mr. Bowers. It is nonsensical to assert that *providing* the tools is not a minimum standard but *replacing* lost tools is. Thus, the Commission itself, in its expertise, did not deem tool loss reimbursement for an employee such as Mr. Bowers a minimum standard. For all these reasons, it is respectfully submitted that the "health and safety" exception and the "minimum standards" exception to federal preemption have no applicability to the instant case.

III.

Assuming Arguendo That § 2802 Is Not Preempted, the Arbitrator's Decision Denying Reimbursement Precludes De Novo Judicial Review.

Assuming arguendo that Labor Code § 2802 is not preempted, there is another reason why this case raises a substantial question of federal labor law. The instant dispute was initially submitted by the union to binding arbitration under the terms of the collective bargaining agreement. The neutral arbitrator denied the grievance, holding that the union had sought tool loss reimbursement in collective bargaining, the parties had bargained about the subject, and the union did not achieve this objective. The arbitrator therefore ruled that reimbursement was not required. (See Appellant's Jurisdictional Statement at 35.)

The union then brought a court action in order to avoid the very arbitrator's decision which it had agreed would be binding. Seeking a "second bite at the apple," the union asked a California court to undo the results of binding arbitration. Well-settled principles of federal labor law preclude such an action. Ever since the Court's decisions in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) and *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960) and its companion cases ("*Steelworkers Trilogy*"), it has been a fundamental principle of federal labor law that if the parties submit a dispute to binding arbitration, the arbitrator's decision is final and precludes a de novo court action seeking the same relief.

Since the *Steelworkers Trilogy* was decided, the Court has twice recognized a narrow exception to this principle. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that because an arbitrator had no expertise in construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), an arbitrator's decision that the employer had not violated the non-discrimination clause of a collective bargaining agreement would not necessarily mean that it had not violated Title VII. Therefore, an employee could pursue a Title VII cause of action in federal court even after an arbitrator had determined that his employer did not violate the non-discrimination clause of the collective bargaining agreement. Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Court held that an arbitrator's decision that the company did not violate the collective bargaining agreement by refusing to compensate its drivers for time spent inspecting their trucks would not preclude a private action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("F.L.S.A."), for unpaid wages.

In each of these two cases, the Court recognized the federal policy favoring arbitration of labor disputes, citing the *Steelworkers Trilogy*, and stressed the narrowness of its holding. The Court explained that an arbitrator's ruling would not preclude court action in these cases because of the strong federal policy underlying both Title VII and the F.L.S.A. As the Court explained in *Barrentine:*

> "While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of *a statute designed to provide minimum substantive guarantees to individual workers*." 450 U.S. at 737. (Emphasis added)

The Court noted that the arbitration award was not binding in *Gardner-Denver* "because Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights . . ." *Id.*, 450 U.S. at 738. The Court explained that each statute includes an enforcement scheme granting individual employees access to court to remedy violations.

The Court of Appeal below erroneously analogized the instant case to *Alexander v. Gardner-Denver*. Contrary to the Court of Appeal's assumption, this Court has never held that a *state* law would nullify the *Steelworkers Trilogy* principle of binding arbitration. To the contrary, this Court spoke at great length in both *Gardner-Denver* and *Barrentine* of the important *federal* policies underlying Title VII and the F.L.S.A. No such principles apply to an arbitrator's construction of *state* law.

Additionally, § 2802 is clearly not comparable to either Title VII or the F.L.S.A. Unlike Title VII and the F.L.S.A., the California Labor Code does not expressly provide a

private right of action for violation of § 2802. Thus, the analogy to *Gardner-Denver* breaks down. The right to indemnification for tool loss is surely not as necessary for individual protection as the right to be employed free of discrimination or the right to earn a minimum wage. Indeed, as noted earlier, California's Industrial Welfare Commission did not require tool reimbursement for employees such as Mr. Bowers in its Wage Orders.

For these reasons the narrow exception recognized by the Court in *Gardner-Denver* and *Barrentine* does not extend to this case. While arbitration may be an "inadequate forum for enforcement of Title VII rights," 450 U.S. at 738, it is a perfectly adequate forum in which to determine the question of tool loss reimbursement. The general rule of the *Steelworkers Trilogy* that the parties are bound by their agreement to arbitrate the dispute must therefore control. To paraphrase Chief Justice Burger's dissenting opinion in *Barrentine*, it makes neither good sense nor sound law to read the broad language of *Gardner-Denver* — written in a civil rights discrimination case — and the broad language of *Barrentine* — written in an F.L.S.A. minimum wage case — to govern a routine dispute over lost tools, a matter traditionally entrusted by the parties' arm's-length bargaining to binding arbitration.

It is important that the Court take this occasion to reaffirm the *Steelworkers* principle, and to underscore the narrowness of the *Gardner-Denver* and *Barrentine* holdings. Otherwise, state courts may misapply *Gardner-Denver*, as the court below did, and thereby undermine the continuing authority of the *Steelworkers Trilogy*. The Court should take this opportunity to make clear that, while an arbitrator may not be competent to determine "the public law considerations" underlying the F.L.S.A. or Title VII, an arbitrator is per-

fectly able to construe and enforce Labor Code § 2802 or similar state laws. The Court of Appeal's ruling allowing a de novo court action must therefore be reversed.

Conclusion.

For all the foregoing reasons, it is respectfully submitted that this case presents a substantial federal question, and that the Court should note probable jurisdiction of this case, and reverse the decision below.

Dated: September 14, 1983.

Respectfully submitted,

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